

Brief History of Comprehensive Immigration Reform Efforts in the 109th and 110th Congresses to Inform Policy Discussions in the 113th Congress

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Summary

Leaders in both chambers of Congress have listed immigration reform as a legislative priority in the 113th Congress. Most policymakers agree that the main issues in “comprehensive immigration reform” (CIR) include increased border security and immigration enforcement, improved employment eligibility verification, revision of legal immigration, and options to address the millions of unauthorized aliens residing in the country. These elements were among the features that President Barack Obama emphasized when he called for the 113th Congress to take up CIR legislation.

Similar to President Obama’s recent statements on CIR, former President George W. Bush stated that comprehensive immigration reform was a top priority of his second term. President Bush’s principles of immigration reform included increased border security and enforcement of immigration laws within the interior of the United States, as well as a major overhaul of temporary worker visas, expansion of permanent legal immigration, and revisions to the process of determining whether foreign workers were needed. Then—as well as now—the thorniest of these issues centered on unauthorized alien residents of the United States.

During the 109th Congress, both chambers passed major overhauls of immigration law but did not reach agreement on a comprehensive reform package. In the 110th Congress, Senate action on comprehensive immigration reform legislation stalled at the end of June 2007 after several weeks of intensive floor debate. The House did not act on comprehensive legislation in the 110th Congress.

The three major CIR bills in the 109th and 110th Congresses were the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437 as passed by the House in 109th Congress), the Comprehensive Immigration Reform Act of 2006 (S. 2611 as passed by the Senate in 109th Congress), and the Comprehensive Immigration Reform (S. 1639 as considered by the Senate in 110th Congress). All three of the major CIR bills had provisions that would have

- increased resources for border security,
- expanded employment eligibility verification,
- increased the worksite enforcement penalties,
- broadened inadmissibility grounds pertaining to national security and illegal entry and added a ground for gang membership,
- expedited the implementation of the automated entry-exit system known as US-VISIT (United States Visitor and Immigrant Status Indicator Technology),
- broadened the categories of aliens subject to expedited removal,
- increased the criminal penalties for immigration and document fraud, and
- expanded the categories of aliens subject to mandatory detention.

Despite these similarities, there were substantial differences between the chambers regarding the treatment of unauthorized aliens as well as allocations of visas across family and employment categories for future flows of legal immigrants. The House-passed bill in the 109th Congress would have criminalized unauthorized presence. In contrast, the Senate bills in the 109th and 110th Congresses would have created avenues for unauthorized aliens who met a set of criteria and paid prescribed penalties to acquire “earned legalization.” The Senate bills also had provisions that would have made substantial revisions to legal permanent admissions, notably revising and expanding the employment-based permanent and temporary visa categories.

The failure of these substantial efforts to enact CIR in the 109th and 110th Congresses has prompted some to characterize CIR as a “third rail” issue that is too highly charged to touch.

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Introduction

Leaders in both chambers of Congress have indicated that immigration reform is a legislative priority in the 113th Congress. The main elements of “comprehensive immigration reform” (CIR) legislation typically include increased border security and immigration enforcement, improved employment eligibility verification, revision of legal immigration, and options to address the millions of unauthorized aliens residing in the country. In January 2013, a bipartisan group of Senators proposed a framework for CIR that would address these issues and include new temporary worker visas.¹ Several of these elements also were among the features that President Barack Obama emphasized later the same month when he called for the 113th Congress to “quickly” take up CIR legislation, though President Obama has not endorsed new temporary worker visas.²

Similar to President Obama’s recent statements on CIR, former President George W. Bush stated that comprehensive immigration reform was to be a top priority of his second term. President Bush’s principles of immigration reform included increased border security and enforcement of immigration laws within the interior of the United States, as well as a major overhaul of temporary worker visas, expansion of permanent legal immigration, and revisions to the process of determining whether foreign workers were needed. Then—as well as now—the thorniest of these issues centered on unauthorized alien residents of the United States.

Substantial efforts to enact CIR legislation failed in the 109th and 110th Congresses, prompting some to characterize the issue as a “third rail” that is too highly charged to touch.³ The 2006-2007 CIR bills were sweeping in scope and ranged from just under 500 pages to over 800 pages. The three major bills CIR bills that received floor action were

- Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437 as passed by the House in the 109th Congress),
- Comprehensive Immigration Reform Act of 2006 (S. 2611 as passed by the Senate in the 109th Congress), and
- Comprehensive Immigration Reform and for other purposes (S. 1639 as considered by the Senate in 110th Congress)

This report opens with brief legislative histories of CIR in the 109th and 110th Congresses. A comparative overview of key CIR provisions in the three bills that received floor action in the 109th and 110th Congresses follows. In addition to a narrative discussion of how the bills addressed the main provisions of CIR, the report provides a table that presents a comparative summary of the key features of the bills. The report concludes with observations contrasting the

¹ Senators Charles Schumer, John McCain, Richard Durbin, Lindsey Graham, Robert Menendez, Marco Rubio, Michael Bennett, and Jeff Flake, “Bipartisan Framework for Comprehensive Immigration Reform,” press release, January 28, 2013, <http://www.c-span.org/uploadedFiles/Content/Documents/Bipartisan-Framework-For-Immigration-Reform.pdf>.

² The White House, “Fixing our Broken Immigration System so Everyone Plays by the Rules,” press release, January 29, 2013, <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules>.

³ Geoffrey Colvin, “Introducing The New Third Rail: Immigration,” *CNNMoney*, January 12, 2004; Reid Wilson, “Immigration: Not Really A Third Rail,” *Real Clear Politics*, December 12, 2007; Michelle Mittelstadt, “Has immigration become new ‘third rail’?,” *Houston Chronicle*, December 30, 2007; Michael Barone, “Immigration Reform: The New Third Rail,” *The Wall Street Journal*, April 16, 2010.

2006-2007 period with the context of today's CIR debate. The report also provides an appendix that summarizes the three major CIR bills.⁴

Legislative History

The Immigration and Nationality Act (INA), which was first codified in 1952, contained the provisions detailing the requirements for admission (permanent and temporary) of foreign nationals, grounds for exclusion and removal of foreign nationals, document and entry-exit controls for U.S. citizens and foreign nationals, and eligibility rules for naturalization of foreign nationals. Congress has significantly amended the INA several times since 1952, most notably by the Immigration Amendments of 1965, the Refugee Act of 1980, the Immigration Reform and Control Act of 1986, the Immigration Act of 1990, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.⁵

CIR in the 109th Congress

During the 109th Congress, both chambers passed major overhauls of immigration law but did not reach agreement on a comprehensive reform package.

House Action

On November 14, 2005, the Chairman of the House Homeland Security Committee, Representative Peter King, and a bipartisan group of co-sponsors introduced H.R. 4312, the Border Security and Terrorism Prevention Act of 2005, which was jointly referred to the Armed Services, Homeland Security, and Judiciary Committees. The Homeland Security Committee reported H.R. 4312 on December 6, 2005. That same day, the chairman of the House Judiciary Committee, Representative James Sensenbrenner, introduced the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437). On December 13, 2005, the House Judiciary Committee reported H.R. 4437 along a party-line vote. H.R. 4437 included a number of provisions identical to those in H.R. 4312, as reported by the House Homeland Security Committee.

The House Rules Committee met on December 14, 2005, to consider the rule for floor debate on H.R. 4437 and reportedly heard six hours of testimony. In a move that many observers considered a key vote, the Rules Committee rejected a motion to allow an amendment that would have created a guest worker visa program. The amendment, co-sponsored by Arizona Republicans Jim Kolbe and Jeff Flake and California Democrat Howard L. Berman, would have allowed unauthorized aliens to register for new temporary visas. The Rules Committee did agree to 15

⁴ This report relies heavily on other CRS reports, most notably, CRS Report RL33125, *Immigration Legislation and Issues in the 109th Congress*, coordinated by Andorra Bruno; CRS Report RL34204, *Immigration Legislation and Issues in the 110th Congress*, coordinated by Andorra Bruno, CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem; and CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

⁵ Since 2000, other major laws that amended the INA include the USA PATRIOT Act (P.L. 107-56), the Enhanced Border Security and Visa Reform Act of 2002 (P.L. 107-173), Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458), and the REAL ID Act of 2005 (P.L. 109-13, Division B). None of the laws referenced in this footnote attempted a comprehensive reform of the INA.

amendments that could be offered on the floor and approved the rule for H.R. 4437 early on the morning of December 15, 2005.⁶

On December 16, 2005, the House debated and passed H.R. 4437, as amended. The legislation had provisions on border security; the role of state and local law enforcement in immigration enforcement; employment eligibility verification; and other enforcement-related issues including immigration fraud, worksite enforcement, alien smuggling, and migrant detention. H.R. 4437 also contained provisions on unlawful presence, voluntary departure, and alien removal.

Senate Action

The Chairman of the Senate Committee on the Judiciary, Senator Arlen Specter, circulated a draft CIR bill on March 6, 2006 (Chairman's mark) that would have substantially increased legal immigration as well as strengthened border security and immigration enforcement. S. 2454, the Securing America's Borders Act, which Senate Majority Leader William Frist introduced on March 16, 2006, had border security and employment verification provisions that were similar to H.R. 4437 and had provisions revising and increasing legal immigration that were similar to the Chairman's mark. After three weeks of debate, the Senate Judiciary Committee favorably reported a modified version of the Chairman's mark, which also included provisions for a broad legalization program similar to those originally proposed by Senators Edward Kennedy and John McCain.

The Senate failed to invoke cloture on S. 2454 and the Judiciary Chairman's mark during floor debate from March 28, 2006 to April 7, 2006. Senators Chuck Hagel and Mel Martinez proposed alternative language to keep immigration on the Senate's agenda. Chairman Specter, along with Senators Hagel, Martinez, Kennedy, McCain, Lindsey Graham, and Sam Brownback, introduced this compromise as S. 2611 on April 7, 2006, just prior to the April recess. Because this legislation reflected many of the policy features that Senators McCain and Kennedy had articulated over the past few years, S. 2611 became known as the McCain-Kennedy bill. It combined provisions on enforcement and on unlawful presence, voluntary departure, and removal with reform of legal immigration. These proposed revisions to legal immigration included expanded guest worker visas and increased legal permanent admissions. S. 2611 also would have enabled certain groups of unauthorized aliens in the United States to become legal permanent residents (LPRs) if they paid penalty fees and met a set of other requirements. After several days of debate and a series of amendments, the Senate passed S. 2611, as amended, by a vote of 62-36 on May 25, 2006.

Over the summer of 2006, a variety of legislative maneuvers were considered to have both chambers pass an immigration bill with the same number so that a conference committee could be formed on CIR and to overcome other procedural barriers the legislation faced.⁷ President George W. Bush reaffirmed his support for CIR. "Congress is now considering legislation on immigration reform; that legislation must be comprehensive," President Bush said. "All elements of the problem must be addressed together, or none of them will be solved at all."⁸ Congressional

⁶ Charlene Carter, "Rules Hears Testimony on Iraq Resolution; Postpones Action Until Friday," *CQ Markup and Vote Coverage*, December 15, 2005.

⁷ Martin Kady II, "Senate Takes a Step Forward on Immigration Bill Via Procedural Agreements," *CQ Today Online News*, June 29, 2006.

⁸ "Bush Demands Comprehensive Immigration Reform," *CQ Homeland Security*, July 24, 2006.

leaders, however, were unsuccessful at forming a conference committee, and House-passed H.R. 4437 and Senate-passed S. 2611 expired with the end of the 109th Congress.

CIR in the 110th Congress

As the 110th Congress opened, there were widespread reports that Senators Kennedy and McCain were meeting with Representatives Luis Gutierrez and Jeff Flake to discuss a bipartisan approach to CIR and were instructing their staffs to draw up a discussion draft based on S. 2611.⁹ On May 9, 2012, Senate Majority Leader Harry Reid introduced S. 1348, the Comprehensive Immigration Reform Act of 2007. As introduced, S. 1348 was virtually identical to S. 2611, which the Senate had passed in the 109th Congress.¹⁰ Republican support for S. 1348, however, was lacking in the 110th Congress. According to *Roll Call*, “(A)ll 23 Republicans who voted for last year’s immigration bill sent a letter to Majority Leader Reid on Wednesday warning they would not vote for that measure again and calling on the Majority Leader to allow more time to work out a bipartisan deal.”¹¹

Senators Kennedy and Specter introduced a bipartisan compromise proposal for comprehensive immigration reform on May 21, 2007, as S.Amdt. 1150, as the floor debate on S. 1348 began.¹² Similar to S. 1348 (and its predecessor S. 2611), the bipartisan compromise included provisions aimed at strengthening employment eligibility verification and interior immigration enforcement, as well as increasing border security. This substitute language differed from S. 1348 in several key areas of legal immigration. It would have substantially revised legal immigration and temporary worker programs with provisions that differed from S. 1348. Unauthorized aliens in the United States would have been able to become LPRs if they met certain requirements and paid penalty fees in a re-worked legalization process. The Senate failed to invoke cloture on this version of CIR on June 7, 2007, after supporters and opponents of the bill could not agree on a number of amendments to be considered.

Senate Majority Leader Reid and Senate Minority Leader Mitch McConnell publicly affirmed their commitment to debate comprehensive immigration reform in June 2007.¹³ The Senate resumed debate on a modified version of the bipartisan compromise (S. 1639) beginning June 18, 2007.¹⁴ The bill was brought to the floor under an unusual parliamentary procedure known as a “clay pigeon,” which strictly limited the number of amendments to the bill that could be considered.¹⁵ But after one of the clay pigeon amendments passed, the fragile coalition willing to bring the bill to the floor eroded. The Senate failed to invoke cloture on S. 1639, by a vote of 46 to 53, with both Democrats and Republicans opposing the cloture motion. The Senate Majority

⁹ Beth Crowley, “McConnell: ‘Excellent Chance’ for a Bipartisan Immigration Bill in Senate,” *Rollcall*, March 9, 2007.

¹⁰ Michael Sandler, “Senate Immigration Vote Turns Into a Gamble for Reid and His Caucus,” *CQ Today*, May 10, 2007.

¹¹ John Stanton and Erin P. Billings, “Reid Set to Move Border Bill,” *Rollcall*, May 10, 2007.

¹² Among those from the Bush Administration publically associated with negotiating the compromise legislation were Homeland Security Secretary Michael Chertoff and U.S. Citizenship and Immigration Services Director Carlos Gutierrez.

¹³ Michael Sandler, “Senators Seek 60-Vote Test for Most Contentious Immigration Amendments,” *CQ Today*, May 24, 2007. For earlier accounts, see Michael Sandler, “Senate Immigration Vote Turns Into a Gamble for Reid and His Caucus,” *CQ Today*, May 10, 2007.

¹⁴ John Stanton and Jennifer Yachin, “Reid Plots to Block Conservatives,” *Rollcall*, June 18, 2007.

¹⁵ Julie Hirschfeld Davis, “Rare Tactic May Allow Immigration Votes,” *Washington Post*, June 18, 2007.

Leader pulled the bill from the Senate floor, and the drive for CIR legislation in the 110th Congress ended.¹⁶

Comparative Discussion of CIR's Key Features

This comparative analysis broadly sketches the key features of the three sweeping pieces of CIR legislation: H.R. 4437 as passed by the House in the 109th Congress; S. 2611 as passed by the Senate in the 109th Congress; and S. 1639 as considered by the Senate in 110th Congress. The discussion is organized according to the main components of CIR: border security; interior immigration enforcement; worksite enforcement and employment eligibility verification; legal immigration (permanent and temporary); and unauthorized aliens, illegal presence, and legalization. The **Appendix** provides a more detailed discussion of the provisions in the three major bills. It is important to note that a statement indicating that “all the bills had provisions on ...” does not mean that these provisions were identical or even similar in the different bills. Such a statement simply means the legislation had provisions addressing that particular element.

Border Security

The border security component can be found in the INA's provisions to control the entry and exit of foreign nationals. Operationally, this means controlling the official ports of entry through which legitimate travelers enter the country, and patrolling the nation's land and maritime borders to interdict illegal entries. U.S. Customs and Border Protection (CBP) is the lead agency on border security, with the U.S. Border Patrol, within CBP, as the lead agency charged with preventing unauthorized aliens from entering the United States between ports of entry. The INA gives the CBP and the border patrol the statutory authority to search, interrogate, and arrest unauthorized aliens.¹⁷ All three bills would have increased the resources, personnel, infrastructure, and technology for border security.

Foreign nationals (i.e., aliens) not already legally residing in the United States who wish to come to the United States generally must obtain a visa to be admitted. To receive a visa and to enter the country, a foreign national must not be deemed inadmissible according to the specified grounds in the law. These inadmissibility grounds are health-related (e.g., contagious diseases); criminal history; security and terrorist concerns; public charge (e.g., indigence); seeking to work without proper labor certification; illegal entrants and immigration law violations; ineligible for citizenship; and aliens illegally present or previously removed.¹⁸ The major bills would not have made sweeping changes to the inadmissibility grounds, but they would have revised specific grounds pertaining to national security and illegal entry. The three bills would also have added gang membership as a ground for inadmissibility.

The INA requires the inspection of all aliens who seek entry into the United States. As a result, all persons seeking admission to the United States must demonstrate that they are a foreign national with a valid visa and/or passport or that they are a U.S. citizen. Because many foreign nationals are permitted to enter the United States without visas, notably through the Visa Waiver Program, border inspections were extremely important in 2005-2007 for those having their initial screening

¹⁶ Michael Sandler, “Immigration Overhaul Stymied,” *CQ Weekly*, July 9, 2007.

¹⁷ CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, by Marc R. Rosenblum.

¹⁸ CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem.

at the port of entry.¹⁹ Under the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) entry-exit system, certain foreign nationals are required to provide fingerprints, photographs, or other biometric identifiers upon arrival in the United States.²⁰ All of the major bills would have expedited the implementation of US-VISIT and expanded DHS's authority to require aliens (including LPRs) to participate in the system.

Expedited removal enables immigration officers to summarily remove an alien who lacks proper documentation or has committed fraud or willfully misrepresented facts to gain admission into the United States without any further hearings or review, unless the alien indicates either an intention to apply for asylum or a fear of persecution. Under expedited removal, both administrative and judicial review are limited generally to cases in which the alien claims to be a U.S. citizen or to have been admitted previously as a legal permanent resident, a refugee, or an asylee.²¹ All three bills would have broadened the categories of aliens subject to expedited removal.

All three bills also included new criminal penalties for certain immigration-related violations, including new felony offenses for unlawful flight from a border checkpoint. The bills would have strengthened existing penalties for illegal entry and re-entry and for certain passport and visa offenses. All three bills would have expanded DHS detention facilities, and S. 2611 would have directed DHS to acquire or construct 20 additional detention facilities. And all three bills would have made more classes of aliens subject to detention pending removal.

Interior Immigration Enforcement

All the major bills in the 109th and 110th Congresses had provisions aimed at increasing immigration control and enforcement. The INA prohibits the smuggling of aliens across the U.S. border and the transport and harboring of aliens within the United States. Thus, the statute covers a broad spectrum of activities that may subject U.S. citizens as well as foreign nationals to criminal liability if they provide assistance to an alien who is unlawfully present within the United States. All three bills would also have broadened the range of acts considered to be alien smuggling and increased penalties, but the Senate bills would have added humanitarian exceptions.

In addition, all three bills would have expanded the definition of "aggravated felony," a category of criminal offense defined by immigration law that results in enhanced immigration penalties and expedited enforcement provisions.²² Some violations of the INA are not defined as crimes,

¹⁹ In 2007, P.L. 110-53 mandated that the Secretary of DHS, in consultation with the Secretary of DOS, develop and implement an electronic system for travel authorization system (ESTA), through which each alien electronically provides, in advance of travel, the biographical information necessary to determine whether the alien is eligible to travel to the United States and enter under the VWP. CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin.

²⁰ In 1996, §110 of IIRIRA required the Attorney General to develop an automated entry/exit system that among other things (1) collects a record of departure for every alien departing the United States, and matches the record against the record of the alien's arrival in the United States; and (2) allows the identification, through online searches, of nonimmigrants who remain beyond their period of authorized stay. As amended by several subsequent laws, §110 of IIRIRA became the statutory basis of what is now the US-VISIT system. The exit component of US-VISIT has yet to be fully developed. U.S. Government Accountability Office, *Key US-VISIT Components at Varying Stages of Completion, but Integrated and Reliable Schedule Needed*, GAO-10-13, November 19, 2009.

²¹ CRS Report R41753, *Asylum and "Credible Fear" Issues in U.S. Immigration Policy*, by Ruth Ellen Wasem CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

²² CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

such as being an unauthorized alien in the United States,²³ but H.R. 4437 would have defined unlawful presence as a criminal offense.

Immigration-related document fraud includes the counterfeiting, sale, and use of identity documents (e.g., birth certificates or Social Security cards), as well as employment authorizations, passports, or visas. The INA has civil enforcement provisions for individuals and entities proven to have engaged in immigration document fraud.²⁴ All three bills would have increased the criminal penalties for immigration and document fraud.

The INA requires that certain categories of aliens must be detained (i.e., the aliens must be detained during removal proceedings, and if ordered removed, until their removal is effectuated).²⁵ Other foreign nationals who are not subject to mandatory detention nonetheless may be detained, paroled, or released on bond.²⁶ All three bills would have expanded the categories of aliens subject to mandatory detention.

The INA also specifies the circumstances and actions that result in aliens being removed from the United States (i.e., deported). These grounds are comparable to the inadmissibility grounds. They include foreign nationals who are inadmissible at time of entry or violate their immigration status; commit certain criminal offenses (e.g., crimes of moral turpitude, aggravated felonies, alien smuggling, high-speed flight from an immigration checkpoint); fail to register (if required under law) or commit document fraud; are security risks (such as aliens who violate any law relating to espionage, engage in criminal activity that endangers public safety, or partake in terrorist activities or genocide); become a public charge within five years of entry; or vote unlawfully. In removal proceedings, an immigration judge determines whether an alien is removable. All three bills would have revised the grounds for removal, much like the revisions to the grounds for inadmissibility.

While the federal government exercises preeminent authority in the field of immigration, there has been longstanding debate regarding the scope and propriety of state and local efforts to deter the presence of unlawfully present aliens within their jurisdictions. One question centers on the ability of states and localities to adopt legislation aimed at deterring unauthorized aliens who are in their jurisdictions. Another question focuses on the role of state and local police in directly enforcing federal immigration law and whether such enforcement interferes with or disrupts federal immigration policies and objectives. In addressing these questions, the House-passed bill in the 109th Congress would have “reaffirmed” the authority of states to assist in the enforcement of the immigration laws; however, the Senate-passed bill in the 109th Congress would have “reaffirmed” the authority of states to assist in the enforcement of the *criminal* provisions of immigration law. There were no comparable provisions in the final Senate CIR bill in the 110th Congress.²⁷

Employment Verification and Worksite Enforcement

Since the Immigration Reform and Control Act of 1986 (IRCA, P.L. 99-603), it has been unlawful for an employer to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is

²³ Ibid.

²⁴ CRS Report RL34007, *Immigration Fraud: Policies, Investigations, and Issues*, by Ruth Ellen Wasem.

²⁵ CRS Report RL32369, *Immigration-Related Detention*, by Alison Siskin.

²⁶ §236 of INA.

²⁷ CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

not authorized to be employed. All employers are currently required to participate in a paper-based employment eligibility verification system in which they examine documents presented by every new hire to verify the person's identity and work eligibility. Employers must retain these employment eligibility verification (I-9) forms. Employers may opt to participate in an electronic employment eligibility verification program, known as E-Verify, which checks the new hire's employment authorization through Social Security Administration and, if necessary, Department of Homeland Security (DHS) databases.²⁸ All three bills would have established mandatory electronic employment eligibility verification systems.

Employers violating prohibition on unlawful employment may be subject to civil and/or criminal penalties. If DHS's Immigration and Customs Enforcement (ICE) believes that an employer has committed a civil violation, the agency may issue the employer a "Notice of Intent to Fine," which may result in a "Final Order" for civil money penalties, a settlement, or a dismissal. Employers convicted of having engaged in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens may face criminal fines and/or imprisonment.²⁹ All three bills would have increased the penalties for worksite enforcement.

Legal Immigration

Legal immigration is one of the areas in which there were significant differences across the three bills. The major bills in the Senate would have revised the legal immigration system, but the approaches differed substantially from the 109th Congress to the 110th Congress. The House-passed legislation did not address legal immigration, with the exception of eliminating the diversity visa category.³⁰

Immigrants are persons admitted as legal permanent residents (LPRs) of the United States. Under current law, permanent admissions are subject to a complex set of numerical limits and preference categories that give priority for admission on the basis of family relationships, skills needed in the United States, and geographic diversity of sending countries. These include a *flexible worldwide cap* of 675,000, plus refugees and asylees. The INA specifies that each year, countries are held to a numerical limit of 7% of the worldwide level of U.S. immigrant admissions, known as per-country limits. The pool of people who are eligible to immigrate to the United States as LPRs each year typically exceeds the worldwide level set by U.S. immigration law, and, as a consequence, millions of prospective LPRs are waiting in the queue with approved petitions. The *immediate relatives of U.S. citizens* (i.e., their spouses and unmarried minor children, and the parents of adult U.S. citizens) are admitted outside of the numerical limits and are the flexible component of the worldwide cap.

To qualify as a family-based LPR, the foreign national must be a spouse or minor child of a U.S. citizen; a parent, adult child, or sibling of an adult U.S. citizen; or a spouse or unmarried child of a legal permanent resident. At least 226,000 and no more than 480,000 family preference LPRs are admitted each year, excluding immediate relatives of U.S. citizens. To qualify as an employment-based LPR, the foreign national must be an employee for whom a U.S. employer has

²⁸ CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

²⁹ CRS Report R40002, *Immigration-Related Worksite Enforcement: Performance Measures*, by Andorra Bruno.

³⁰ The diversity lottery currently makes 50,000 visas available annually to natives of countries from which immigrant admissions were lower than a total of 50,000 over the preceding five years. To be eligible for a diversity visa, the foreign national must have a high school education or the equivalent, or two years of experience in an occupation that requires at least two years of training or experience. CRS Report R41747, *Diversity Immigrant Visa Lottery Issues*, by Ruth Ellen Wasem.

received approval from the Department of Labor to hire; a person of extraordinary or exceptional ability in specified areas; an investor who will start a business that creates at least 10 new jobs;³¹ or someone who meets the narrow definition of the “special immigrant” category.³² The INA allocates 140,000 admissions annually for employment-based immigrants. The INA also provides LPR visas to aliens who are selected in the diversity lottery from countries sending low numbers of immigrants.³³

The Senate-passed bill in the 109th Congress would have increased LPR admissions, both for family-based and employment-based categories. The Senate bill in the 110th Congress would have revised the immediate relative definition and eliminated certain categories of family-based admissions. It would also have replaced the current categorical employment-based system with a point-based merit system. All three bills would have eliminated the diversity visa lottery.

“STEM visa” is shorthand for an expedited immigration avenue that enables foreign nationals with graduate degrees in science, technology, engineering, or mathematics (STEM) fields to adjust their immigration status to LPR without waiting in the queue of numerically limited LPR visas.³⁴ The Senate bills in the 109th and 110th Congresses would have permitted foreign students on a proposed STEM student visa to adjust to LPR status. Also, the bills would have allowed an unlimited number of foreign nationals who had earned an advanced degree in a STEM field and had been working in a related field in the United States during the preceding three years to become LPRs. The House bill had no comparable provisions.

Nonimmigrants³⁵—such as tourists, foreign students, diplomats, temporary workers, cultural exchange participants, or intracompany business personnel—are admitted for a specific purpose and a temporary period of time. Nonimmigrants are required to leave the country when their visas expire, though certain classes of nonimmigrants may adjust to LPR status if they otherwise qualify. There are 24 major nonimmigrant visa categories, and over 70 specific types of nonimmigrant visas are issued currently. The major nonimmigrant category for temporary workers is the H visa. Professional workers typically use the H-1 visa, which includes professional specialty workers (H-1B) and nurses (H-1C). There are two visa categories for temporary seasonal workers (i.e., guest workers): agricultural guest workers (H-2A) and other seasonal/intermittent workers (H-2B). Unskilled workers are eligible for H-2A and the H-2B visas. Efforts to amend the House-passed bill to include selected reforms of temporary worker visas for guest workers failed. Both Senate bills would have made major revisions to temporary worker visas, which would have included the establishment of large-scale temporary worker programs. The Senate bill from the 110th Congress in particular would have established new temporary worker visas (Y visas).³⁶

³¹ CRS Report RL33844, *Foreign Investor Visas: Policies and Issues*, by Alison Siskin and Chad C. Haddal.

³² Special immigrants include ministers of religion, religious workers other than ministers, and certain employees of the U.S. government abroad.

³³ CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*, by Ruth Ellen Wasem.

³⁴ CRS Report R42530, *Immigration of Foreign Nationals with Science, Technology, Engineering, and Mathematics (STEM) Degrees*, by Ruth Ellen Wasem.

³⁵ Nonimmigrants are often referred to by the letter that denotes their section in the statute, such as H-2A agricultural workers, F-1 foreign students, or J-1 cultural exchange visitors. CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

³⁶ CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

Unauthorized Aliens, Illegal Presence, and Legalization

All the major bills in the 109th and 110th Congress had provisions dealing with unauthorized aliens residing in the United States, but the two chambers differed markedly in their approaches. The three main components of the unauthorized resident alien population are (1) aliens who overstay their nonimmigrant visas, (2) aliens who enter the country surreptitiously without inspection, and (3) aliens who are admitted on the basis of fraudulent documents. The first case is a civil offense, but the second and third cases are criminal offenses. In all three instances, the aliens are in violation of the INA and subject to removal.³⁷

Unauthorized presence—absent other factors—is not a crime under the INA. However, an alien who is unlawfully present in the United States for longer than 180 days but less than a year is inadmissible for three years after the alien’s departure. An alien who is unlawfully present for at least a year is inadmissible for 10 years after the alien’s departure. The bars may be waived for a spouse or a son or daughter of a citizen or permanent resident if refusal of admission would result in extreme hardship to the citizen or permanent resident. The INA makes indefinitely inadmissible an alien who (1) has been ordered removed or has been unlawfully present for an aggregate period of longer than a year, and (2) enters or attempts to reenter without being formally admitted.³⁸

The House-passed bill in the 109th Congress would have criminalized unauthorized presence. In contrast, the Senate bills in the 109th and 110th Congresses would have created avenues for unauthorized aliens who met a set of criteria and paid prescribed penalties to acquire “earned legalization.” The Senate bill from the 110th Congress would have created a transitional legalization pathway through a proposed Z visa and would have conditioned the legalization provisions on the successful implementation of key border security measures (i.e., trigger mechanisms).

Unauthorized aliens who were brought to the United States as children are a specific subpopulation that some argue warrant special legislative action, usually referred to as DREAM Act legislation.³⁹ Various versions of the DREAM Act would enable eligible individuals who entered the country before age 16 and satisfy other requirements to obtain LPR status. Both Senate bills included DREAM Act provisions.

Unauthorized aliens who have worked in agriculture comprise another subpopulation that has been the subject of proposed legislation, usually known by the shorthand of AgJOBS.⁴⁰ This legislation, circulating in various forms since the late 1990s, combines provisions to reform the temporary agricultural worker program (H-2A visa) with a program to legalize the status of farm workers. Both Senate bills had AgJOBS provisions.

³⁷ CRS Report R41207, *Unauthorized Aliens in the United States*, by Andorra Bruno.

³⁸ CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem.

³⁹ Development, Relief, and Education for Alien Minors or DREAM Act; see CRS Report RL33863, *Unauthorized Alien Students: Issues and “DREAM Act” Legislation*, by Andorra Bruno.

⁴⁰ Agricultural Job Opportunities, Benefits, and Security Act, or AgJOBS; see CRS Report R42434, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*, by Andorra Bruno.

Table I. Comparative Summary of Key Features of Major CIR Legislation

	H.R. 4437 in 109th Congress (House-passed)	S. 2611 in 109th Congress (Senate-passed)	S. 1639 in 110th Congress (failed Senate cloture)
Border security	increased resources, personnel, infrastructure, and technology	increased resources, personnel, infrastructure, and technology	increased resources, personnel, infrastructure, and technology
Inspections	criminal penalties for attempting to evade inspection	criminal penalties for attempting to evade inspection	criminal penalties for attempting to evade inspection; any alien who refuses a lawful request for biometric data would be made inadmissible
US-VISIT	expedited implementation	expedited implementation	expedited implementation and expanded authority to require aliens to provide biometric data
Criminalization of illegal presence	made unauthorized presence a felony offense	no provision	no provision
Inherent role of state and local law enforcement	"reaffirmed" the authority of states to assist in the enforcement of the immigration laws	"reaffirmed" the authority of states to assist in the enforcement of the <i>criminal provisions</i> of immigration law	no provision
Grounds for inadmissibility and/or removal	broadened the consequences for terrorism-related grounds and illegal entry; added gang membership as a ground.	broadened the consequences for terrorism-related grounds and illegal entry; added gang membership as a ground.	broadened the consequences for terrorism-related grounds and illegal entry; added gang membership as a ground.
Alien smuggling	broadened acts considered alien smuggling and increased penalties	broadened acts considered alien smuggling and increased penalties, but added humanitarian exceptions	broadened acts considered alien smuggling and increased penalties, but added humanitarian exceptions
Immigration-related fraud	expanded the criminalization of immigration-related fraud	expanded the criminalization of immigration-related fraud	expanded the criminalization of immigration-related fraud
Worksite enforcement	increased penalties	increased penalties	increased penalties
Employment verification	mandatory electronic verification of new hires and existing employees	mandatory electronic verification of new hires; also mandatory electronic verification of new hires and existing employees <i>of</i>	mandatory electronic verification of new hires and existing employees

	H.R. 4437 in 109th Congress (House-passed)	S. 2611 in 109th Congress (Senate-passed)	S. 1639 in 110th Congress (failed Senate cloture)
		<i>DHS-designated employers</i>	
Immediate relatives	no provisions	broadened immediate relative category	narrowed immediate relative category
Family-based permanent immigration	no provisions	increased admissions	eliminated categories
Employment-based permanent immigration	no provisions	increased admissions, including unskilled workers	replaced preference categories with a point system
Numerical limits on permanent admissions	no provisions	increased worldwide levels and raised per country ceilings to 10%	raised per country ceilings to 10% and temporarily increased worldwide levels
STEM visas	no provisions	included provisions	included provisions
Low-skilled temporary workers	no provisions	created new “H-2C” low-skilled visa	created new “Y” low- skilled visa
Legalization	no provisions	established broad earned legalization	established broad earned legalization and transition pathway through new Z visa
Trigger provisions	no provisions	no provisions	included enforcement- related “triggers” to be met prior to implementation of legalization provisions.
Agjobs	no provisions	included provisions	potentially eligible for new Z visa
DREAM Act	no provisions	included provisions	potentially eligible for new Z visa

Source: CRS analysis of the legislation.

Looking Forward

Since the CIR debates of the 109th and 110th Congresses, much has happened in the United States. Most notably, the nation experienced a severe economic recession from December 2007 through June 2009 as part of a worldwide economic crisis.⁴¹ Arguably, any efforts to address CIR legislation against the backdrop of an economic recession would have sharpened the social and business cleavages and narrowed the range of options. Although the unemployment rate has declined since the recession ended, it remains at a historically high level.⁴² While support for certain elements of CIR may continue to be dampened by persistently high unemployment, proponents of CIR argue that revisions to immigration policy are essential ingredients for economic growth.

Given the weakened “pull” of employment opportunities in the United States, it is not surprising that the latest research indicates that illegal entries to the United States have fallen.⁴³ Estimates derived from the March Supplement of the U.S. Census Bureau’s Current Population Survey (CPS) indicate that the unauthorized resident alien population (commonly referred to as illegal aliens) has leveled off at 11.1 million in 2011. Declining birth rates and economic improvements in Mexico have also diminished the “push” factors.⁴⁴ These push-pull trends, along with increased border security and a record number of alien removals are other important factors that have depressed the levels of unauthorized migration in recent years.⁴⁵

CRS analysis has identified six laws passed since January 1, 2006, that included provisions related to immigration enforcement and border security, despite the absence of CIR legislation. The CRS analysis further noted that investments in immigration enforcement personnel, data systems, and enforcement programs have resulted in more, and higher-consequence, immigration enforcement outcomes.⁴⁶ These factors lead some observers to suggest the immigration control measures at the border and within the interior may have become more efficacious in recent years than during the 2005-2007 period.

Current fiscal concerns and the tightening of the federal budget point to another contrast with the 2005-2007 period. In the years immediately after the 9/11 terrorist attacks, Congress substantially increased appropriations for border security and immigration control. There was a broad base of support to increase spending for these purposes, as evidenced by the preceding analysis of the three major bills. Members of the 113th Congress, however, face difficult choices as they prioritize border security and immigration control resources within the fiscal constraints of what may be termed a zero-sum game.

⁴¹ For a detailed explanation on the determination of recessions, see CRS Report R40052, *What is a Recession and Who Decided When It Started?*, by Brian W. Cashell.

⁴² CRS Report R41785, *The Increase in Unemployment Since 2007: Is It Cyclical or Structural?*, by Linda Levine.

⁴³ “Push-pull” theory is commonly used in migration studies to characterize the motivations that propel people to immigrate. “Push” factors would include demographic growth, low living standards, lack of economic opportunities, and political repression. “Pull” factors would be demand for labor, availability of land, good economic opportunities, and political freedoms.

⁴⁴ CRS Report R42560, *Mexican Migration to the United States: Policy and Trends*, coordinated by Marc R. Rosenblum.

⁴⁵ CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem.

⁴⁶ CRS congressional distribution memorandum, *Immigration Enforcement Since 2006*, by Marc Rosenblum, January 29, 2013. Available upon request to Congressional clients.

Since the last major CIR debates, the U.S. Supreme Court (*Arizona*, 132 S. Ct. at 2498) has ruled on the role state and local law enforcement plays in immigration policy. In June 2012, the Court ruled that some aspects of the Arizona state law (S.B. 1070) intended to deter unlawfully present aliens from remaining in the state were preempted by federal law. In *Arizona v. United States*, however, the Supreme Court held that states are generally preempted from arresting or detaining aliens on the basis of suspected removability under federal immigration law. Such action may be taken only when there is specific federal statutory authorization, or pursuant to “request, approval, or instruction from the Federal Government.” CRS legal analysis has summarized that the Supreme Court had made clear that opportunities for states to take independent action in the field of immigration enforcement are more constrained than some had previously believed.⁴⁷

Finally, over 3 million LPRs have naturalized as U.S. citizens since 2007. During FY2002 through FY2011, the DHS Office of Immigration Statistics reported that 6.6 million LPRs became citizens.⁴⁸ According to the U.S. Bureau of the Census, there were almost 15 million naturalized citizens of the United States in the 2010 decennial census.⁴⁹ These demographic trends document the growing importance of immigration as a major policy domain as well as the increasing number of stakeholders in the CIR debate.

The challenge of immigration reform today is balancing the hopes of employers to increase the supply of legally present foreign workers, the longings of families to live together, the dreams of unauthorized aliens to gain a legal status, and the demand that all migrants comply with the rule of law. Whether Congress will act to alter immigration policies—either in the form of CIR or in the form of incremental revisions aimed at strategic changes—is at the crux of the debate.

⁴⁷ CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by Kate M. Manuel and Michael John Garcia; and CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

⁴⁸ DHS Office of Immigration Statistics, *Yearbook of Immigration Statistics: 2011*, Table 22, <http://www.dhs.gov/yearbook-immigration-statistics-2011-1>.

⁴⁹ CRS Report R41592, *The U.S. Foreign-Born Population: Trends and Selected Characteristics*, by William A. Kandel.

Appendix. Summaries of the Three Major CIR Bills⁵⁰

Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437 in 109th Congress)

The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) contained provisions on border security, the role of state and local law enforcement, employment eligibility verification and worksite enforcement, alien smuggling, migrant detention, and other enforcement-related issues. In addition to these provisions, H.R. 4437 had significant provisions on unlawful presence, voluntary departure and removal, expedited removal, and denying U.S. entry to nationals from countries that refused to accept the return of their deported nationals.

Border Security

H.R. 4437, as passed by the House, would have required the Secretary of DHS to submit a National Strategy for Border Security outlining a comprehensive strategy for securing the border, including a surveillance plan and a timeline for implementation. It would have added personnel, surveillance, and infrastructure resources at and between ports of entry (POE) and would have directed DHS to work with the Department of Defense (DOD) to formulate a plan for increasing the availability and use of military equipment to assist with the surveillance of the border. It would have required DHS to make the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program interoperable with Federal Bureau of Investigation (FBI) criminal datasets by shifting to a 10-fingerprint system for aliens who were required to register with the program as they enter the country, and would have required DHS to submit a timeline for deploying US-VISIT at all land POEs and for implementing the system's biometric exit component.

H.R. 4437 would have broadened the role of state and local governments in immigration enforcement, including governments near the border (also see "State and Local Law Enforcement"). In particular, the bill would have directed DHS to design and carry out a border security exercise involving officials from federal, state, local, tribal, and international governments as well as representatives from the private sector within one year of the bill's enactment. And it would have allowed homeland security grant funding to be used to reimburse state and local governments for costs associated with detecting and responding to the unlawful entry of aliens. H.R. 4437 also would have required mandatory detention in most circumstances of all aliens apprehended at the border or ports of entry—including aliens from Mexico—pending their removal from the country.

State and Local Law Enforcement

H.R. 4437 would have "reaffirmed" the existing inherent authority of states (including their law enforcement personnel), as sovereign entities to investigate, identify, apprehend, arrest, detain, or transfer into federal custody aliens in the United States for the purpose of assisting in the enforcement of the immigration laws.

⁵⁰ Andorra Bruno, Michael Garcia, Alison Siskin and Marc Rosenblum provided major written contributions to this Appendix.

Among its other provisions, H.R. 4437 would have required the Secretary of DHS to create a training manual to aid state and local law enforcement officers in carrying out immigration-related enforcement duties. It would have authorized the secretary to make grants to state and local police agencies for the procurement of equipment, technology, facilities, and other products that are directly related to the enforcement of immigration law. H.R. 4437 would have allowed a state to reimburse itself with certain DHS grants for activities related to the enforcement of federal laws aimed at preventing the unlawful entry of persons or things into the United States that are carried out under agreement with the federal government. The bill would have further required designated sheriffs within 25 miles of the southern international border of the United States to be reimbursed or provided with an advance for costs associated with the transfer of aliens detained or in the custody of the sheriff.

Employment Eligibility Verification

Title VII of H.R. 4437, as passed by the House, would have directed DHS to establish an employment eligibility verification system, which would be mandatory for all employers.⁵¹ Employers would have been required to query the system to verify the identity and employment eligibility of an individual after hiring or before commencing recruitment or referral. These verification requirements would have taken effect two years after enactment. The current I-9 system⁵² would remain in place with some modifications. H.R. 4437 would also have required employers to verify the identity and employment eligibility of previously hired workers within six years after enactment.

Worksite Enforcement

H.R. 4437 would have increased existing monetary penalties for criminal violations by employers. At the same time, it would have provided for the reduction of civil monetary penalties for employers with 250 or fewer employees.

Alien Smuggling

H.R. 4437, as passed by the House, would have rewritten the alien smuggling provisions in the INA. It would have broadened the types of acts that are considered alien smuggling. For example, it would have made it a smuggling offense to transport a person outside the United States knowing or in reckless disregard of the fact that the person was in unlawful transit from one country to another, or on the high seas, and was seeking to illegally enter the United States. In addition, H.R. 4437 would have established mandatory minimum sentences for those convicted of alien smuggling, and would have enhanced penalties for persons carrying firearms during smuggling offenses. It furthermore would have amended the law to allow for the seizure and forfeiture of any property used to commit or facilitate alien smuggling.⁵³

⁵¹ For an explanation of the employment eligibility verification system, see CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

⁵² All employers currently are required to participate in a paper-based employment eligibility verification system in which they examine documents presented by every new hire to verify the person's identity and work eligibility. Employers must retain these employment eligibility verification (I-9) forms.

⁵³ See U.S. Government Accountability Office, *Combating Alien Smuggling: Opportunities Exist to Improve the Federal Response*, GAO-05-305, May 27, 2005.

Visa Revocation

Under current law, there is no judicial review of a visa revocation, except in the context of a removal proceeding if the visa revocation provides the *sole* ground for removal. The House-passed bill would have barred judicial review of visa revocation in any context. No court would have had jurisdiction to hear any claim arising from, or any challenge to, visa revocation.

Legal Immigration and Legalization

House-passed H.R. 4437 did not contain provisions that would have reformed legal immigration, nor did it have provisions that would have legalized the status of unauthorized aliens in the United States. An amendment approved during the floor debate would have eliminated the diversity visa category.

Comprehensive Immigration Reform Act of 2006 (S. 2611 in 109th Congress)

The Comprehensive Immigration Reform Act of 2006 (S. 2611) combined provisions on enforcement and on unlawful presence, voluntary departure, and removal with reform of legal immigration. These revisions to legal immigration would have included expanded guest worker visas and increased legal permanent admissions. S. 2611 would also have enabled certain groups of unauthorized aliens in the United States to become LPRs if they paid penalty fees and met a set of other requirements.

Border Security

As passed by the Senate, S. 2611 contained a number of border security-related provisions comparable to those in House-passed H.R. 4437. Like H.R. 4437, S. 2611 would have required the Secretary of DHS to submit a National Strategy for Border Security outlining a comprehensive strategy for securing the border, including a surveillance plan and a timeline for implementation. It would have added personnel, surveillance, and infrastructure resources at and between POE, and would have directed DHS to work with DOD to formulate a plan for increasing the availability and use of military surveillance equipment at the border. It would have required DHS to enhance US-VISIT data collection to allow interoperability with FBI datasets and required DHS to submit a timeline for deployment of the program, including exit screening, at all land ports. Like H.R. 4437, S. 2611 would have required mandatory detention in most cases of aliens apprehended at the border or a POE, but would not have included Mexican aliens in this requirement. S. 2611 would also have added 20,000 new detention beds.

In comparison with H.R. 4437, S. 2611 would have added a larger number of border enforcement personnel, including by authorizing border state governors to deploy National Guard troops to the border. S. 2611 differed from H.R. 4437 by broadening DHS authority to operate on public lands. And it would have placed greater emphasis on technology, requiring DHS to develop and implement a plan to ensure clear two-way communications for DHS agents working along the border, including three separate provisions that would have directed DHS to acquire and deploy various kinds of surveillance assets in order to establish a “virtual fence” along the southwest border. S. 2611 would have established new criminal penalties for attempting to evade inspection at POE or for disregarding orders given by CBP officers, Border Patrol agents, or ICE investigators, as well as new penalties for constructing border tunnels. S. 2611 also sought to expand U.S.-Mexican and multilateral cooperation on border security, including by requiring DHS to consult with Mexico on border infrastructure construction; by requiring new reports on

information-sharing on North American security procedures; by working with Mexico, Canada, and Central America to reduce unauthorized migration from Guatemala and Belize; and by working with Mexico to combat alien smuggling and gang activity, discourage illegal Mexican outflows, and encourage return migration.

Alien Smuggling

In terms of alien smuggling, S. 2611 was similar to H.R. 4437 but not identical in language or in scope. Although both bills would have broadened the types of acts that are considered alien smuggling, Senate-passed S. 2611 would also have provided new exemptions from criminal liability for persons or organizations providing assistance to unauthorized aliens on humanitarian grounds (such exemptions are not contained in current law). H.R. 4437, in contrast, contained no such exemptions and would also have removed the current exemption contained in P.L. 109-97 for religious organizations that encourage certain unauthorized aliens to work for the organizations as volunteer ministers or missionaries. Similar to H.R. 4437, Senate-passed S. 2611 would have established mandatory minimum sentences for those convicted of alien smuggling, enhanced penalties for persons carrying firearms during smuggling offenses, and amended the law to allow for the seizure and forfeiture of any property used to commit or facilitate alien smuggling.

State and Local Law Enforcement

S. 2611 would have “reaffirmed” a state’s inherent authority to investigate, identify, apprehend, arrest, detain, or transfer into federal custody aliens in the United States. However, it would have limited such practices at the state and local level to the enforcement of the *criminal* provisions of the INA.

Employment Eligibility Verification

S. 2611 would have directed DHS to implement an employment eligibility verification system, which would be mandatory for all employers. Employers would have been required to participate in the system with respect to all employees hired on or after the date that is 18 months after at least \$400 million is appropriated and made available for implementation. Under S. 2611, employers would have been required to query the system to verify the identity and employment eligibility of an individual after hiring or recruiting or referring for a fee. In addition, DHS could have required any employer or class of employers to participate in the system with respect to individuals employed as of the date of enactment or hired after the date of enactment, if DHS designated such employer or class as a critical employer based on homeland security or national security needs or if DHS has reasonable cause to believe that the employer had materially violated the prohibitions on unauthorized employment. Under S. 2611, individuals who were terminated from employment based on a determination by the verification system that they were not eligible to work could have obtained administrative and judicial review. If they were, in fact, determined to be eligible to work and prevail, they would have been entitled to compensation for lost wages.

Worksite Enforcement

Under S. 2611, the current I-9 system would have remained in place with some modifications. In addition, S. 2611 would have increased monetary penalties for employer violations and would have established a new penalty for employees who falsely represented on the I-9 form that they were authorized to work.

Family-Based Immigration

In its handling of family-based legal immigration, S. 2611 would have no longer deducted immediate relatives of U.S. citizens from the overall family-sponsored numerical limit of 480,000.⁵⁴ This change would have likely added at least 226,000 more family-based admissions annually (based on the current floor of 226,000 family-sponsored visas). The numerical limits on immediate relatives of LPRs would have increased from 114,200 (plus visas not used by first preference) to 240,000 annually.

Employment-Based Immigration

In terms of employment-based immigration, S. 2611 would have increased the annual number of employment-based LPRs from 140,000 to 450,000 from FY2007 through FY2016, and set the limit at 290,000 thereafter. S. 2611 would also have no longer counted the derivative family members of employment-based LPRs as part of the numerical ceiling. S. 2611 would have reallocated employment-based visas as follows: up to 15% to “priority workers”; up to 15% to professionals holding advanced degrees and certain persons of exceptional ability; up to 35% to skilled shortage workers with two years training or experience and certain professionals; up to 5% to employment creation investors; and up to 30% (135,000) to unskilled shortage workers.

Employment-based visas for certain special immigrants would have no longer been numerically limited. S. 2611 would also have no longer counted the derivative family members of employment-based LPRs as part of the numerical ceiling. If each employment-based LPR would be accompanied by 1.2 family members (as is currently the ratio), then an estimated 540,000 additional LPRs might have been admitted. However, the Senate passed an amendment on the floor that placed an overall limit of 650,000 on employment-based LPRs and their accompanying family annually for FY2007-FY2016.

Numerical Limits

S. 2611 included a provision that would have exempted from direct numerical limits those LPRs who were being admitted for employment in occupations in which the Secretary of Labor deemed there were insufficient U.S. workers “able, willing, and qualified” to work. Such occupations are commonly referred to as Schedule A because of the subsection of the code where the secretary’s authority derives. Currently, nurses and physical therapists are listed on Schedule A, as are certain aliens deemed of exceptional ability in the sciences or arts (excluding those in the performing arts).

Title V of S. 2611 would have raised the current per-country limit on LPR visas from an allocation of 7% of the total preference allocation to 10% of the total preference allocation (which would be 480,000 for family-based and 450,000/290,000 for employment-based LPRs under this bill).⁵⁵ Coupled with the proposed increases in the worldwide ceilings, these provisions would have eased the visa wait times that oversubscribed countries (i.e., China, India, Mexico, and the Philippines) currently have by substantially increasing their share of the overall ceiling. The bill would have also eliminated the exceptions to the per-country ceilings for certain family-based and employment-based LPRs.⁵⁶

⁵⁴ For an explanation of these legal immigration categories, see CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*, by Ruth Ellen Wasem.

⁵⁵ The per-country ceiling for dependent states (such as Macau) would have been raised from 2% to 7%.

⁵⁶ For analysis of immigration trends and projections under S. 2611, see CRS Congressional Distribution

In addition, special exemptions from numerical limits would also have been made for aliens who have worked in the United States for three years and who have earned an advanced degree in STEM fields. Certain widows and orphans who met specified risk factors would also have been exempted from numerical limits. The bills would have further increased overall levels of immigration by reclaiming family and employment-based LPR visas when the annual ceilings were not met, during the period FY2001-FY2005. Unused visas from one preference category in one fiscal year would have rolled over to the other preference category the following year.

Temporary Workers

S. 2611 would have significantly expanded the number of guest worker and other temporary foreign worker visas available each year and would have coupled these increases with eased opportunities for these temporary workers to ultimately adjust to LPR status.⁵⁷ Whether the LPR adjustments of guest workers and other temporary foreign workers were channeled through the numerically limited, employment-based preferences or were exempt from numerical limits (as were the proposed F-4 STEM foreign student fourth preference adjustments) would have affected the projections and the future flows.

Legalization Pathways

Senate-passed S. 2611 would have established legalization mechanisms separate from guest worker programs. Under Title VI, Subtitle A of S. 2611, the Secretary of DHS would have adjusted the status of an alien and the alien's spouse and minor children to LPR status if the alien meets specified requirements. The alien would have had to establish that he or she was physically present in the United States on or before April 5, 2001; had not departed during the April 5, 2001-April 5, 2006, period except for brief departures; and was not legally present as a nonimmigrant on April 5, 2006. Among the other requirements, the alien would have had to establish employment for at least three years during the April 5, 2001-April 5, 2006, period and for at least six years after enactment, and would have had to establish payment of income taxes during that required employment period. Such adjustments of status would not have been subject to numerical limits.

Also under Title VI, Subtitle A of S. 2611, aliens who were unable to meet the presence and employment requirements for adjustment to LPR status but who had been present and employed in the United States since January 7, 2004, and met other requirements, could have been able to apply to DHS for Deferred Mandatory Departure (DMD) status. Eligible aliens would have been granted DMD status for up to three years. An alien in DMD status could have applied for immigrant or nonimmigrant status while in the United States, but would have had to depart the country in order to be admitted under such status. The alien could have exited the United States and immediately re-entered at certain land points of entry. Aliens granted DMD status who were subsequently admitted to the country as H-2C aliens could have applied to adjust to LPR status.

Title VI, Subtitles B and C of S. 2611 contained additional provisions that would have enabled certain unauthorized aliens in the United States to apply for LPR status. Subtitle B would have established a "blue card" program for certain agricultural workers in the United States. Under the

Memorandum, "Legal Immigration: Modeling the Principle Components of Permanent Admissions, Part 2," by Ruth Ellen Wasem, May 10, 2006. Available upon request to Congressional clients.

⁵⁷ For an analysis of guest worker and other temporary foreign worker visas legislation, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno; and CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*, by Ruth Ellen Wasem.

program, aliens who had performed requisite agricultural employment and met other requirements would have been able to obtain blue card status. Not more than 1.5 million blue cards could have been issued during the five years beginning on the date of enactment. After meeting additional requirements, blue card holders would have been able to adjust to LPR status outside the INA's numerical limits.

Subtitle C, known as the DREAM Act, would have enabled aliens who first entered the United States before age 16, had a high school diploma or the equivalent or had been admitted to an institution of higher education, and met other requirements to apply for LPR status. Individuals who qualified would have been granted LPR status on a conditional basis. No numerical limitations would have applied. The conditional LPR status would have been valid for six years, after which the alien could have applied to have the condition removed subject to specified requirements.

Comprehensive Immigration Reform and for Other Purposes (S. 1639 in 110th Congress)

S. 1639 included provisions aimed at strengthening employment eligibility verification and interior immigration enforcement, as well as increasing border security. It would have substantially revised legal immigration with a point system and expanded temporary worker programs. Unauthorized aliens in the United States would have been able to legalize their immigration status if they met certain requirements, paid penalty fees, and qualified for the new pathways that would have been established by the bill.

Border Security

Regarding border security, S. 1639 included provisions generally similar to those found in S. 2611 with respect to border security strategic planning; increased border enforcement personnel, infrastructure, and surveillance technology; access to public lands; secure two-way communications; changes to make the US-VISIT system interoperable with FBI databases and to develop a plan for the deployment of US-VISIT technology and exit screening at POEs; and the addition of 20,000 new detention beds.

S. 1639 differed from the 2006 bills in that it included new subtitles on provisions related to unaccompanied alien children and on asylum and detention safeguards, including provisions related to detention standards, alternatives to detention, and a legal orientation program for detainees. The bill would have imposed broad new requirements to detain aliens pending removal under certain circumstances, and increased the minimum bond to be imposed on non-Mexicans being released on bond. S. 1639 also included new penalties for unlawful flight from immigration or customs controls and expanded DHS' authority to seize smuggling vehicles.

Interior Enforcement

Many of the enforcement-related provisions contained in S. 1639 resembled those found in S. 2611 and, to a lesser extent, H.R. 4437. S. 1639 would have provided for an increase in immigration enforcement resources (including detention space) and personnel over a period of several years. S. 1639 would also have expanded the grounds for inadmissibility and/or removal to cover participation in a criminal street gang, felony drunk driving convictions, and convictions for several other crimes relating to domestic violence, sex offenses, and document fraud. S. 1639 also contained several provisions that aimed to encourage aliens to comply with the terms of voluntary departure agreements.

The bill would have amended existing criminal prohibitions against unlawful entry or reentry, including by heightening criminal penalties for certain types of offenses. However, unlike H.R. 4437, S. 1639 would not have criminalized illegal presence. S. 1639 would also have rewritten and expanded the scope of federal laws criminalizing immigration-related fraud (including passport fraud and marriage fraud). The bill would have attempted to facilitate increased cooperation between federal immigration enforcement authorities and state and local police, including by requiring DHS to enter cooperative “287(g)” agreements with entities within every U.S. state, and by instructing federal authorities to take into custody unlawfully present aliens held by state or local authorities when requested.

Employment Eligibility Verification

Title III of S. 1639 would have amended INA §274A to establish a new employment eligibility verification system (EEVS; modeled on the current largely voluntary electronic system). Under S. 1639, it would have been unlawful for an employer or other entity to hire, or recruit or refer for a fee, an individual for employment in the United States without verifying identity and employment eligibility, as specified. Over time, participation in the new electronic EEVS would have become mandatory. As of the date of enactment, the Secretary of DHS would have been authorized to require any employer or industry that was a federal contractor, part of the critical infrastructure, or directly related to U.S. national or homeland security to participate in the new EEVS. This requirement could have been applied to both newly hired and current employees. No later than 18 months after the date of enactment, all employers would have been required to participate in the new EEVS with respect to newly hired employees and certain current employees. No later than three years after enactment, all employers would have been required to participate with respect to new employees and all employees not previously verified through the EEVS.

Individuals who received final notices that the system could not confirm their employment eligibility (known under the bill, as under E-Verify, as final non-confirmation notices) could have sought administrative and judicial review, but they would not be eligible to be compensated for lost wages resulting from system errors.

Worksite Enforcement

Under S. 1639, the current I-9 system would have remained in place with some modifications. Changes would also have been made to existing monetary penalties for employer violations. Among its other employment eligibility verification and worksite enforcement-related provisions, S. 1639 would have provided for the disclosure of certain taxpayer identity information by the Social Security Administration (SSA) to DHS; required SSA to issue more secure Social Security cards; and established a voluntary program through which participating employers could submit employees’ fingerprints to verify identity and employment eligibility.

Family-Based Immigration

In terms of family-based immigration, S. 1639 would have narrowed the types of family relationships that would make an alien eligible for a visa.⁵⁸ Foremost, it would have eliminated the existing family-sponsored preference categories for the adult children and siblings of U.S. citizens (i.e., first, third, and fourth preferences). It would have also eliminated the existing category for the adult children of LPRs. The elimination of these categories would have been

⁵⁸ For an explanation of these legal immigration categories, see CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*, by Ruth Ellen Wasem.

effective for cases filed after January 1, 2007. When visas became available for cases pending in the family-sponsored preference categories as of May 1, 2005, the worldwide level for family preferences would have been reduced to 127,000. The worldwide ceiling would have been set at 440,000 annually until these pending cases cleared.

Immediate relatives exempt from numerical limits would have been redefined to include only spouses and minor children of U.S. citizens. The parents of adult U.S. citizens would have no longer been treated as immediate relatives; instead, parents of citizens would have been capped at 40,000 annually. The spouses and minor children of LPRs would have remained capped at a level comparable to current levels—87,000 annually.

Employment-Based Immigration

In terms of employment-based immigration, the first three preference categories⁵⁹ would have been eliminated and replaced with a point system. This proposed point system would have established a tier for “merit-based” immigrants. The point system for merit-based immigrants would have been based on a total of 100 points divided between four factors: employment, education, English and civics, and family relationships.⁶⁰ The special immigrant and investor/job creation employment-based preference categories would have remained.

Temporary Workers

In terms of temporary workers, S. 1639 would have repealed the H-2B visa, revised the H-2A and H-1B visas, and established new temporary worker visas (Y visas).⁶¹ The proposed Y-1 visa would have covered aliens coming temporarily to the United States to perform certain types of temporary labor or services. The Y-1 visa would have sunset after five years. The proposed Y-2 or Y-2B visa would have covered aliens coming temporarily to the United States to perform seasonal nonagricultural labor or services. Y-2B nonimmigrants would have been granted a period of admission of 10 months. Following this period, they would have needed to be physically present outside the United States for two months before they could have been readmitted to the country in Y status. There would have been no limit on the number of times a Y-2B nonimmigrant could be readmitted. The Y-2 visa would have been capped at 100,000 for the first fiscal year. In subsequent years, the cap would have increased or decreased based on demand for the visas, subject to a maximum cap of 200,000. An exemption from the Y-2 cap would have been provided for an alien who had been present in the United States as an H-2B or Y-2B nonimmigrant during any one of three fiscal years immediately preceding the fiscal year of the approved start date of a petition for an H-2B or Y-2B nonimmigrant worker. The proposed Y-3 visa would have covered the spouses and minor children of Y-1 or Y-2B nonimmigrants and would have been capped at 20% of the annual numerical limit on the Y-1 visa, or 40,000.

⁵⁹ The employment-based preference categories proposed for elimination were: persons of extraordinary ability in the arts, science, education, business, or athletics; outstanding professors and researchers; and certain multi-national executives and managers; members of the professions holding advanced degrees or persons of exceptional abilities in the sciences, art, or business; and professional workers and skilled and unskilled shortage workers.

⁶⁰ The point system would have included a maximum of 47 points, based upon occupation, employer endorsement, experience at a U.S. firm, age, and national interest criteria (all within the “employment” factor). Additionally, the proposal would have emphasized education and skills, especially in the fields of science, technology, engineering, and mathematics (STEM). It also would credit points for language proficiency and for having family in the United States.

⁶¹ For an analysis of guest worker and other temporary foreign worker visas legislation, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno; and CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*, by Ruth Ellen Wasem.

Legalization Pathways

S. 1639 would have provided avenues for unauthorized aliens to gain legal status through a set of Z and Z-A visas. The proposed Z-1 visa would have covered aliens who had been continuously physically present in the United States since January 1, 2007, and were employed. To be eligible, the aliens could not have been lawfully present in the United States on January 1, 2007, under any nonimmigrant classification or any other immigration status made available under a treaty or other multinational agreement ratified by the Senate. There would have been no limitation on the number of aliens who could have been granted Z-1 status. Subject to specified requirements, applicants for Z-1 status would have received probationary benefits in the form of employment authorization pending final adjudication of their applications. The period of admission for a Z-1 nonimmigrant would have been four years. A Z-1 nonimmigrant could have sought an unlimited number of four-year extensions of the period of admission, subject to specified requirements. Aliens in Z-1 status could also have applied to adjust to LPR status, subject to specified requirements.

The proposed Z-2 and Z-3 visas would have covered specified family members of Z-1 aliens, where the family members had been continuously physically present in the United States since January 1, 2007. There would have been no limitation on the number of aliens who could be granted Z-2 or Z-3 status. Subject to specified requirements, applicants for Z-2 or Z-3 status would have received probationary benefits in the form of employment authorization pending final adjudication of their applications. Aliens in Z-2 or Z-3 status could also have applied to adjust to LPR status, subject to specified requirements.

The proposed Z-A visa would have covered aliens who were coming to the United States to perform agricultural service or activity and who met specified requirements. Among the requirements would have been performance of at least 863 hours, or 150 work days, of agricultural employment in the United States during the 24-month period ending on December 31, 2006. No more than 1.5 million Z-A visas could have been issued. Spouses or minor children of Z-A nonimmigrants would have been eligible for Z-A dependent visas, which would have been subject to a numerical limit. An alien in Z-A status could have sought an unlimited number of four-year extensions of the period of admission, subject to specified requirements. Aliens in Z-A status could also have applied to adjust to LPR status, subject to specified requirements.

S. 1639 would also have enabled certain eligible aliens who were unauthorized to adjust to LPR status by means of a point system after they had worked in the United States on the proposed Z visa.⁶² These Z-to-LPR adjustments would have been scored on the merit-based point system, plus four additional factors: recent agricultural work experience, U.S. employment experience, home ownership, and medical insurance. These Z-to-LPR adjustments would not have counted under the worldwide ceilings. Likewise, aliens issued Z-A visas or Z-A dependent visas who were granted adjustment to LPR status would not have counted toward the worldwide numerical limitations on permanent admissions or toward the numerical limitations on individual states.

S. 1639 would have established three different worldwide ceiling levels for the merit-based point system. For the first five fiscal years post-enactment, the worldwide ceiling would have been set at the level made available during FY2005—a total of 246,878.⁶³ Of this number, 10,000 would have been set aside for exceptional Y visa holders to become LPRs, and 90,000 would have been allocated for reduction of the employment-based backlog existing on the date of enactment.

⁶² CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

⁶³ U.S. Department of Homeland Security, Office of Immigration Statistics, *2005 Yearbook of Immigration Statistics*, table 6, 2006.

In the sixth year after enactment, the worldwide level for the merit-based point system LPRs would have dropped to 140,000, provided that priority dates on cases pending reached May 1, 2005. Of this number, 10,000 would have again been set aside for exceptional Y visa holders, and up to 90,000 would have been set aside for reduction of the employment-based backlog existing on the date of enactment.

When the visa processing of the pending family-based and employment-based petitions would have reached those with May 1, 2005, priority dates, it would have triggered the provisions in S. 1639 enabling the Z-to-LPR adjustments to go into effect. At that time, the merit-based point system worldwide level would have become 380,000. The Z-to-LPR adjustments, however, would have occurred outside of this worldwide level. The proposal nonetheless would have continued to set aside 10,000 for exceptional Y visa holders to become LPRs.

S. 1639 additionally would have created a new F-4 visa category for foreign students pursuing STEM fields to obtain practical training. Foreign students with the proposed F-4 visa could have been employed in the United States for periods of up to 24 months after completing their degree. The proposed F-4 visas would not have been numerically limited.

A version of the DREAM Act was also included in S. 1639. The S. 1639 version of the DREAM Act, however, was substantially different than the provisions that passed in S. 2611. S. 1639's DREAM Act provisions were tied to other provisions in the bill to enable certain unauthorized aliens in the United States to obtain legal status under a new "Z" nonimmigrant visa category. S. 1639, like most other DREAM Act bills, would have coupled adjustment of status provisions for unauthorized students with language addressing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provision that places restrictions on state provision of educational benefits to unauthorized aliens. Unlike most other DREAM Act bills, however, S. 1639 would not completely repeal the IIRIRA provision. Instead, §616(a) of S. 1639 would have made the provision inapplicable with respect to aliens with probationary Z or Z status.⁶⁴

Effective Date Triggers

Largely to address concern that enacted CIR legislation would have successfully legalized millions of foreign nationals and increased future flow, but would not have effectively enforced the enhanced border security and employment verification requirements, S. 1639 had trigger mechanisms linking the elements.⁶⁵ More specifically, S. 1639 included provisions that would have required that certain temporary worker and legalization provisions of the bill not go into effect until certain triggers were certified by DHS and the U.S. Government Accountability Office (GAO) to be established, funded, and operational. The triggers would have included

- "operational control" of 100% of the Southwest border;⁶⁶
- deployment of 20,000 U.S. Border Patrol agents;
- installation along the Southwest border of at least 300 miles of vehicle barriers, 370 miles of border fencing, and 105 ground-based radar and camera towers;

⁶⁴ For further information on the version of the DREAM Act included in S. 1639, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

⁶⁵ Trigger provisions had been in S. 1348 as well.

⁶⁶ Under the §2 of Secure Fence Act of 2006 (P.L. 109-367), "operational control" is defined by law to mean "the prevention of all unlawful entries into the United States." S. 1639 did not include a definition of operational control as the term was used in its section on effective date triggers.

- deployment of at least four unmanned aerial vehicle (UAV) systems;
- detention until removal of 100% of aliens apprehended on the Southwest border, with certain humanitarian and other exceptions;
- detention space to accommodate at least 31,500 aliens per day;
- implementation of strict identity document standards for employment verification purposes; and
- implementation of an electronic employment eligibility verification system.

These trigger provisions were located in the first title of the bill and were linked to the temporary workers provisions in Title IV and legalization provisions in Title VI.

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